U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-R-B-, P.A.

DATE: FEB. 9, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a law firm, seeks to employ the Beneficiary permanently in the United States as a business administrative analyst under the immigrant classification of advanced degree professional. *See* Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), which provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1). As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

The Director, Texas Service Center, denied the petition. The Director determined that the Petitioner had not established that it had the continuing ability to pay the Beneficiary the proffered wage beginning on the priority date of the visa petition. The Director denied the petition accordingly.

The matter is now before us on appeal. The Petitioner submits additional evidence and asserts that the Director erred in declining to consider additional evidence of its finances in demonstrating its ability to pay the proffered wage.

We conduct *de novo* review of all issues involving the application of law, policy, and discretion to the facts of a case. S*ee* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). Upon *de novo* review, we will dismiss the appeal.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on January 15, 2014. The proffered wage as stated on the ETA Form 9089 is $100,755.00 per year.

On the petition, the Petitioner claimed to have been established in [redacted] to have a gross annual income of $741,915.00, and to currently employ 10 workers in the United States. On the ETA Form 9089, signed by the Beneficiary on July 2, 2014, the Beneficiary claims to have worked for the Petitioner since November 6, 2013.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the Beneficiary's Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, indicate that the Petitioner paid the Beneficiary $32,841.02 in 2014. As such, the Petitioner paid the Beneficiary partial wages and must establish that it has the ability to pay the difference between the proffered wage and the actual wages paid in 2014.[1]

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and

[1] The difference between the proffered wages and the actual wages paid in 2014 are $67,913.98.

profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. The courts have specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses). Similarly, the courts have agreed that adding depreciation back into net income does not reflect an employer's ability to pay the proffered wage. *See River Street Donuts,* 558 F.3d at 118 and *Chi-Feng Chang,* 719 F. Supp. at 537.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2]

The Petitioner's 2014 tax return shows $9,227.00 in net income and -$12,862.00 in net current assets.[3]

As such, for 2014, the Petitioner did not have sufficient net income or net current assets to pay the difference between the proffered wage and the actual wages paid to the instant Beneficiary.

Additionally, USCIS records indicate that the Petitioner has filed a Form I-140 immigrant petition on behalf of one other immigrant beneficiary which was pending or approved from the instant priority date onwards.[4] Accordingly, the Petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The record reflects that the Petitioner did not pay the other beneficiary any wages in 2014.[5] Thus, it is concluded that the Petitioner has not established its continuing ability to pay the difference between the proffered wage and the actual wages paid to the instant Beneficiary or its other beneficiary.

On appeal and in response to our August 27, 2015, notice of intent to dismiss and request for evidence (NOID/RFE), the Petitioner contends that its audited financial statements provide a better sense of the Petitioner's overall financial health because they are based on the accrual, rather than cash, basis accounting method. However, the Petitioner only submitted its audited financial statements for January 1, 2014 through June 30, 2014.

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[2] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[3] Schedule K of the Form 1120S does not have entries for additional income, credits, deductions or other adjustments to net income.

[4] The beneficiary of this Form I-140 immigrant petition had not yet adjusted status by the instant priority date.

[5] The other beneficiary's proffered wage was $95,701.00. The other beneficiary became a lawful permanent resident on June 4, 2014. The Petitioner must establish its ability to pay the proffered salary for the portion of 2014 that the beneficiary had not yet adjusted status.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa,* USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

On appeal, the Petitioner contends that its audited financial statements present a more comprehensive view of the overall health of the business and its ability to pay the proffered wage. The Petitioner's audited financials and IRS Forms 1120S for 2012 and 2013 differ greatly from one another as shown below:

Tax Year	Net Income	Calculation of Net Current Assets	Gross Sales	Payroll and Consulting Fees	Fee Receipts Only
Audited Financials					
2012	$160,842.00	$642,848.00	$708,214.00	$229,676.00	$708,177.00
2013	$295,443.00	$948,767.00	$868,220.00	$279,422.00	$868,046.00
Tax Returns					
2012	$26,348.00	-$196,104.00	$600,334.00	$193,938.00	$600,334.00
2013	$25,803.00	-$45,676.00	$732,991.00	$242,444.00	$732,991.00

We noted in our NOID/RFE that the differences between the tax returns and audited financial statements may be due to accrual accounting in audited financials versus cash accounting in taxes. Under the cash basis of accounting, revenues are reported on the income statement when the cash is

received. Under the accrual basis of accounting, expenses are matched with the related revenues and/or are reported when the expense occurs, not when the cash is paid.

In response to our NOID/RFE, the auditor confirmed that the audit was performed under the accrual method of accounting. The auditor states that the Petitioner keeps her accounts on a cash basis, which may account for the discrepancies between the audited financial statements and the tax returns.

We concur that the tax returns reflect that the Petitioner files on a cash basis. However, as stated in our NOID/RFE, the Petitioner's pay check report and billing reports reflect that it uses the accrual method of accounting. The instructions to Form 1120S indicate that an S corporation must use the method of accounting regularly used in the keeping of its books and records. *See* www.irs.gov (accessed January 20, 2016). As such, there should be no variance between key information contained in the audited financials and the tax records.[6] It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner did not address these inconsistencies

The Petitioner's contention that its audited financial statements present a more comprehensive view of the overall health of the business and its ability to pay the proffered wage is unpersuasive. A primary use of audited financial statements is to provide the audited company a means by which to obtain capital (loans or investment) at as low a cost as possible. A financial audit is conducted to provide an opinion as to whether the financial statements are stated in accordance with international accounting standards, although auditors may conduct audits of financial statements prepared using the cash basis or some other basis of accounting appropriate for the organization. In providing an opinion whether financial statements are fairly stated in accordance with accounting standards, the auditor gathers evidence to determine whether the statements contain material errors or other misstatements. The audit opinion is intended to provide reasonable assurance, but not absolute assurance, that the financial statements are presented fairly, in all material respects, and/or give a true and fair view in accordance with the financial reporting framework.[7] The purpose of an audit is to provide an objective independent examination of the financial statements, which increases the value and credibility of the financial statements produced by management and increasing user

[6] We note that the Petitioner did not utilize the nonaccrual experience method under 26 C.F.R. §1.448(d)(5), which would reflect some variance in income due to nonaccrual of bad debts, because it did not attach a statement showing total gross receipts and the amount not accrued as a result of the bad debt.

[7] Without forensic accounting, there is no guarantee that the financial statements are free of fraud. This is known as the "expectations gap." Mary-Jo Kranacher, Richard A. Riley, Jr., Joseph T. Wells, *Forensic Accounting and Fraud Examination* (2d ed. 2011); Martin Fridson, Fernando Alvarez, *Financial Statements Analysis: A Practitioner's Guide* (4th ed. 2011).

confidence in the financial statement, reducing investor risk and consequently reduce the cost of capital of the preparer of the financial statements.[8]

The audited financial statements in the instant case do not better represent the Petitioner's ability to pay the wages to its beneficiaries. The audited financial statement does not include a cash flow statement to show how changes in balance sheet accounts and income affect cash and cash equivalents, and break the analysis down to operating, investing and financing activities. The cash flow statement is concerned with the flow of cash in and out of the business and is useful in determining the short-term viability of a company, particularly its ability to pay bills.[9] As the audited financials do not include a cash flow statement, the net income and net current assets from the cash-based tax returns better reflect the Petitioner's ability to pay wages in each relevant year.

In response to our NOID/RFE, the Petitioner contends that the Petitioner's sole shareholder's personal tax returns are evidence of alternate funds available as part of its ability to pay the proffered wage. USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

However, in the present matter, the Petitioner has identified itself on IRS Form 1120S as a "personal service corporation." Pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967), the petitioner's "personal service corporation" status is a relevant factor to be considered in determining its ability to pay. A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). Personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, we recognize the Petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

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[8] Mary-Jo Kranacher, Richard A. Riley, Jr., Joseph T. Wells, *Forensic Accounting and Fraud Examination* (2d ed. 2011); Martin Fridson, Fernando Alvarez, *Financial Statements Analysis: A Practitioner's Guide* (4th ed. 2011).
[9] *Id.*

The documentation presented here indicates that there is a sole shareholder who performs the personal services of the legal practice. According to the Petitioner's 2014 IRS Form 1120 Schedule E (Compensation of Officers), the shareholder elected to pay herself $55,100.00. This figure is supported by the shareholder's W-2 Forms for 2014, which was submitted for the record. However, the Petitioner's Quarterly Federal Tax Returns (Form 941) do not demonstrate the financial flexibility that the employee-owner has in setting her salary based on the profitability of her personal service corporation legal practice. Nor does it show that the Petitioner exercises a large degree of financial flexibility in setting employee salaries or that it easily fulfills its salary obligations. There has been very little change in officer's compensation in the last three years and the increase in salaries and consulting fees directly corresponds to gross income from fees. Even if we accept that the Petitioner's shareholder would be able and willing to forgo her entire 2014 salary to pay the proffered wage,[10] the amount would be insufficient to cover the difference between the proffered wage and the actual wages paid to the instant Beneficiary as well as the wages owed to the other beneficiary.

On appeal and in response to our NOID/RFE, the Petitioner contends that the shareholder is a seasoned and well-known and respected attorney in U.S. immigration law and regularly lectures on the subject. In support of these assertions, the Petitioner submits the following:

- Evidence that she hosts a weekly radio show on [redacted]
- Copy of the [redacted], co-written by the shareholder.
- Copy of [redacted] written by the shareholder.
- Copies of slides from a power-point presentation in Spanish, listing the shareholder as a presenter.
- The shareholder's [redacted] card and [redacted] membership certificate.
- Copies of the Petitioner's website.
- Copy of a [redacted] letter from President Bill Clinton, thanking the shareholder for her participation in the [redacted]
- Copy of a [redacted] letter from Senator Hillary Rodham Clinton, thanking the [redacted] for providing her with a copy of her book.

The evidence submitted by the Petitioner is self-promotional in nature and does not indicate that the business is considered to be outstanding. Neither of the letters referenced above are related to the shareholder's or the Petitioner's reputation within its industry. There is no evidence that the shareholder's presentations were given in a forum which would imply her outstanding reputation within the industry. There is no evidence that the shareholder's published books are regarded as

[10] The share-holder's personal taxes reflect that she and her husband received capital gains from the sale of their personal residence in 2014 which would be sufficient to cover their household expenses during 2014. However, the personal tax returns reflect that the shareholder's salary from the Petitioner is her primary source of income.

important or exemplar within the industry.[11] The shareholder's or memberships are also not indicative of her reputation in the industry.[12]

In the instant case, the Petitioner's 2014 net income and net current assets were insufficient to cover the difference between the proffered wage and the actual wages paid to the instant Beneficiary's or the wages owed to the other beneficiary on whose behalf it filed a Form I-140 immigrant petition. While the fees generated by the law firm have increased almost $150,000.00 over the past three years, the cost of salaries and consulting fees have also increased by more than $160,000.00. As discussed above, the Petitioner has not established its reputation within its industry. In addition, there is insufficient evidence in the record of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the Petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the Petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of G-R-B-, P.A.*, ID# 10949 (AAO Feb. 9, 2016)

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[11] The Petitioner's tax returns and the shareholder's tax returns do not reflect significant income from the publication of these books.